

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-1079

MRS. BETTY POPE
Petitioner,

v.

CITY OF ATLANTA, WILLIAM A. HEWES
as Assistant Director of the Bureau
of Buildings of the City of Atlanta,
and **STATE OF GEORGIA**
Respondents

**On Petition for Writ of Certiorari to
The Supreme Court for the
State of Georgia**

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT FOR THE
STATE OF GEORGIA

QUESTIONS PRESENTED

1.

Whether a petition for writ of certiorari
which only raises issues under the constitu-
tion of the State of Georgia should be
granted.

2.

Whether a taking is effected by a law
which does not interfere with any existing
use of petitioner's property, but which
prevents petitioner from building a tennis
court on that portion of her property within
the flood plain of a major metropolitan river.

STATEMENT OF THE CASE

This case is before the United States Supreme Court on petition for writ of certiorari in the case of Pope v. City of Atlanta, et al, 242 Ga. 331 (1978). The case deals with the Metropolitan River Protection Act, Ga. Laws 1973, p. 128, et seq., as amended, (River Act) which is challenged by Mrs. Betty Pope as violating the Constitution of the State of Georgia.

The events leading up to this litigation commenced on February 17, 1976, when Mrs. Pope began clearing and grading work on her property in preparation for construction of a tennis court. (Rec.2).¹ This property is a residential lot within the City of Atlanta and adjacent to the Chattahoochee River. (Rec. 2). The construction was commenced by Mrs. Pope without having sought or obtained a building permit from the City of Atlanta (hereinafter the City) or approval of such work pursuant to the River Act (Rec. 3,6). The construction work proceeded, including cut and fill operations and the erection of a retaining wall, until March 12, 1976, when a private citizens group, not a party to this proceeding, filed suit to enjoin the construction for failure to comply

¹"Rec." refers to the record in Pope v. City of Atlanta, et al, 240 Ga. 177, 240 S.E.2d 241, (1976) which is the record in this case, also.

with City ordinances and the River Act (Rec.3). On that same day, Mrs. Pope applied for and obtained a building permit for the construction of a "fence in fact only". (Rec. 3,71). On March 17, 1976, the City issued an order halting work on the tennis court construction. (Rec.4). On April 2, 1976, the City advised Mrs. Pope that it planned to issue a citation for violation of the stop-work order. (Rec. 6).

Subsequent to the issuance of the stop-work order, the City requested the Atlanta Regional Commission (ARC) to review the proposed tennis court pursuant to section 6 of the River Act. (Ex. Vol. Kroeck-5-6)² After review of the proposed project, ARC recommended that the project be modified so as to bring the proposed tennis court into conformance with the River Act and the land and water use plan adopted pursuant thereto. (Ex. Vol. Kroeck-13). ARC suggested that the tennis court be constructed on another portion of Mrs. Pope's property

²The pleadings and evidence from an action filed by Mrs. Pope in the United States District Court were stipulated into evidence in the State proceeding which was appealed to the Georgia Supreme Court in Pope v. City of Atlanta, et al, supra. The pleadings and orders appear in the Appendix, hereinafter cited as App. _____. The depositions appear in the Exhibit Volume and are hereinafter referred to by name of the deponent and page number, as Ex. Vol. Kroeck - _____.

in order to avoid encroachment into the floodplain and into the 150 feet buffer zone along the river. (Ex. Vol. Kroeck-25). The City has chosen not to override the recommendation of ARC, as it would have been authorized to do pursuant to the procedures set forth in section 6 of the River Act.

After issuance of the City's stop-work order, Mrs. Pope began to seek judicial intervention in her behalf, and she proceeded first to the United States District Court for the Northern District of Georgia. An action was filed in District Court seeking to enjoin the City and ARC from enforcement of the River Act. (App. 1-13). After hearing and submission of briefs, and based on the evidence submitted by the parties, on August 23, 1976, the Federal court entered judgment against Mrs. Pope and dismissed the complaint with prejudice. Pope v. City of Atlanta, et al, 418 F. Supp. 665 (1976). That judgment has been summarily affirmed without opinion by the United States Court of Appeals for the Fifth Circuit. Pope v. Atlanta, et al, 575 F2d 298 (1978).

Shortly after the judgment against her was entered in Federal District Court, Mrs. Pope filed an action in the Superior Court of Fulton County, alleging, among other things, that the River Act violated her State due process and eminent domain rights, 1976 Const., Art. I, Sec. I, Par. I (Ga. Code Ann. § 2-101), Art. I, Sec. III, Par. I (Ga. Code Ann. § 2-301).

The Fulton Superior Court ruled that this claim was barred by res judicata because of the prior Federal action. However, on appeal, the Georgia Supreme Court ruled that the claim was not barred because it raised important undecided State Constitutional issues and remanded the case for consideration of Mrs. Pope's State due process and imminent domain claims.

On remand, Mrs. Pope, relying on the record filed in Pope v. City of Atlanta, et al, 240 Ga. 177 (1976) was denied relief. She appealed to the Georgia Supreme Court and that Court also denied relief. She now petitions for writ of certioari in this Court.

REASONS FOR NOT GRANTING THE WRIT

- A. WHERE, IN STATE COURT, ONE CLAIMS THAT A STATE LAW IS UNCONSTITUTIONAL UNDER THE STATE CONSTITUTION AND THE STATE COURT RENDERS A DECISION REGARDING THE CONSTITUTIONALITY OF SUCH LAW UNDER THE STATE CONSTITUTION, THERE IS NO BASIS UPON WHICH A PETITION FOR WRIT OF CERTIORARI MAY PROCEED IN THE UNITED STATES SUPREME COURT.

In her petition for writ of certiorari, Mrs. Pope seeks to have this Court review a decision of the Georgia Supreme Court as to the interpretation of the Constitution of the State of Georgia. That Mrs. Pope's petition for the writ of certiorari should be denied is clear.

Pursuant to 28 U.S.C. § 1257(3), this Court may review State court decisions, as follows:

"By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity especially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States."

All such questions and issues which might have been presented in Mrs. Pope's petition here were, or could have been,

presented in Mrs. Pope's Federal court action. Pope v. City of Atlanta, et al, 418 F. Supp. 665 (N.D. Ga. 1976); aff'd mem., 575 F. 2d 298 (5th Cir. 1978). Mrs. Pope does not file her petition from the ruling of the United States Court of Appeals for the Fifth Circuit in her case and the time for filing such a petition has expired. In addition, the State Court decision from which Mrs. Pope files her petition, involves questions of State law, exclusively. Mrs. Pope seems to concede as much by stating on pages 2 and 7 of her petition that the issue for review by this Court is whether the River Act violates the Georgia Constitution.

Mrs. Pope does refer to a Federal statute (Public Law 95-344) in the "Questions Presented" section of her petition, but she does not suggest that the statute is drawn in question in this case. Rather, she seems to make a visceral suggestion that the River Act should provide for compensation because Public Law 95-344 (which is totally different from, and unrelated to, the River Act) provides for compensation. There is nothing in the record showing that Mrs. Pope has been affected in any way by Public Law 95-344 or even that an issue involving that law has been presented to any of the courts of Georgia. Under these circumstances, there can be no doubt that Mrs. Pope has failed to present a question for review involving Public Law 95-344. Tacon v. Arizona, 410 U.S. 351, 352 (1973); White v. Johnson, 282 U.S. 367, 373 (1931).

B. WHERE A REGULATION ALLOWS A PERSON TO HAVE FULL USE OF A PARCEL OF LAND, BUT PROHIBITS HER FROM BUILDING A TENNIS COURT IN A PORTION THEREOF WHICH EXTENDS INTO THE FLOOD PLAIN OF A MAJOR METROPOLITAN RIVER, SUCH REGULATION DOES NOT EFFECT A TAKING OF PROPERTY WITHOUT JUST COMPENSATION.

As noted previously, there are no Federal questions presented by Mrs. Pope in her petition for a writ of certiorari. Assuming, however, that Mrs. Pope has presented a proper petition in this case, it should be denied.

Mrs. Pope asserts that the River Act has effected the taking of her property because it prevents her from building a tennis court on that portion of her property that is within the flood plain of the Chattahoochee River. She makes no claim that the River Act has resulted in the reduction of the value of her property along the Chattahoochee. Her whole argument rests on the fact that the River Act interfered with her ability to develop her property in the manner she desired. There is no merit in this argument. Addressing a similar argument in Penn Central Transportation Co., v. City of New York, U.S. _____, 46 L.W. 4856, 4863 (1978), this Court stated:

"(T)he submission that...(persons) may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was for development is quite simply untenable".

Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922), which Mrs. Pope relies heavily upon, does not support her position. In that case, this Court found that a taking had occurred where the practical effect of a regulation was to deprive the company of all of its property rights. This Court also found that the regulation involved there did not protect any substantial public interest. Mrs. Pope cannot contend that the River Act has operated to deprive her of her property. The property in question contains a house, driveway, man-made lake and swimming pool. The River Act has not affected the uses of Mrs. Pope's property and, in fact, does not prevent the building of a tennis court on her property outside the flood plain of the Chattahoochee River.

"(T)aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole..." Penn Central Transportation Co. v. City of New York, *Supra*, at 4863.

Sub judice, the River Act causes little or no interference with Mrs. Pope's use of her property. It does not provide for the physical invasion of her property; it does not impose any affirmative duty upon her with respect to the use of her property; and it provides for the uniform regulation of similarly situated land. Indeed, the River Act seems well within this Court's holding

in Gorieb v. Fox, 274 U.S. 603 (1926), wherein a city ordinance which prohibited the building of structures on certain portions of city property was found not to constitute a taking.

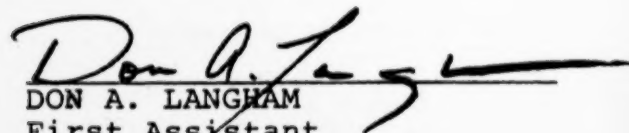
CONCLUSION

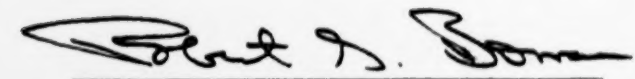
For the reasons aforesaid, it is respectfully prayed that a writ of certiorari to review the judgment of the Supreme Court of Georgia be denied.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

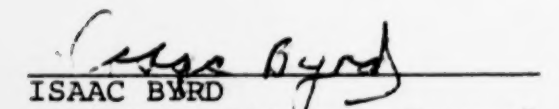
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CERTIFICATE OF SERVICE

I, Robert S. Bomar, attorney for the State of Georgia, hereby certify that I have served all of the parties of record with the within and foregoing brief for the Respondent in Opposition by mailing three copies of same, to all counsel of record, at their correct mailing addresses, with sufficient postage affixed thereto as follows:

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This 7 day of February, 1979

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